UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SW DESIGN SCHOOL, LLC, d/b/a
INTERNS4HIRE.COM AND d/b/a K12CODERS,
AND SW DESIGN SCHOOL, L3C, A SINGLE-
INTEGRATED BUSINESS ENTERPRISE AND/OR
EMPLOYER

and Case 5-CA-243576

MATTHEW HYSON, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Paul J. Veneziano
Counsel for the General Counsel
National Labor Relations Board, Region Five
Washington Resident Office
1015 Half Street SE, Suite 6020
Washington, D.C. 20570
Telephone: (202) 273-1709
Fax: (202) 208-3013
paul.veneziano@nlrb.gov

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I. INTRODUCTION

Respondent's Exceptions reprise a series of arguments that Administrative Law Judge (ALJ) Michael A. Rosas thoroughly considered and explicitly rejected in his decision dated June 8, 2020 (ALJD). Respondent's first exception erroneously claims that the ALJ failed to consider documentary evidence that the ALJ specifically quoted—and specifically discredited—in his decision. Respondent's second exception parades a cavalcade of pretextual excuses for its unlawful decision to terminate Charging Party Matthew Hyson (Hyson) on May 15, 2019.[1] Respondent's second exception also erroneously claims that Hyson did not become an employee under Section 2(3) of the Act until May 13. Nevertheless, the overwhelming weight of the evidence demonstrates that ALJ appropriately refused to credit Respondent's ever-changing, pretextual excuses. The record and Board precedent also firmly establish that Hyson became a 2(3) employee when he applied to become an employee on January 30. Finally, Respondent's third exception bewilderingly contends that the ALJ's recommended remedies are somehow inappropriate despite being the standard remedies the Board orders in unlawful discharge cases. Counsel for the General Counsel therefore respectfully requests that the Board overrule Respondent's misguided and unfounded exceptions.

II. SUMMARY OF RELEVANT FACTS

A. Respondent's Business

Tarsha Weary (Weary) has created a network of three business entities across three jurisdictions under the name of SW Design School. In 2014, Weary incorporated a SW Design School, LLC in Michigan to "[o]perate as an online entrepreneurial school that will teach

[1] Hereinafter, all dates occur in 2019 unless otherwise noted.

individuals how to successfully start, market, and grow a business." (GC Exh. 2–A.)[2] In 2015, Weary amended the Michigan entity's articles of incorporation to become a low-profit limited liability company, also known as an L3C, now known as SW Design School (Michigan L3C). (GC Exh. 2–B; GC Exh. 3–B at 2.) Until February 2020, Michigan L3C operated a website at www.thecareerleaders.co.[3] (Tr. 27:3–33:15.)

In 2015, Weary incorporated a separate limited liability company named SW Design School, LLC in Maryland. (GC Exh. 11 at 1; GC Exh. 12 at 2). In 2016, Weary requested and received a trade name for the Maryland entity. (GC Exh. 13 at 1, 3.) After approval, the Maryland entity began trading as Interns4Hire.com (Interns4Hire). (GC Exh. 13 at 3; GC Exh. 14; Tr. 25:14–18, 175:11–19.) During the relevant period, Interns4Hire's facility was located at 201 Ritchie Road, Capitol Heights, Maryland (Capitol Heights office). (GC Exh. 14; Tr. 59:1–60:1, 180:9–25.) In addition to providing graphic and web-design services, Interns4Hire also partners with state and local governments to train individuals with new skills. Interns4Hire also hires individuals itself and places those employees at Interns4Hire client locations. (Tr. 89:22–25, 91:4–92:24, 93:1–14, 94:20–24; 224:1–14, 226:2–19, 228:23–229:12, 384:21–385:10, GC Exh. 23 at 3–4, 16–17; GC Exh. 27; GC Exh. 28; GC Exh. 29; GC Exh. 30; GC Exh. 32.)

In January 2019, Weary and her Michigan L3C entity organized a new limited liability company in Washington, D.C. (GC Exh. 4 at 1–2.) The Washington, D.C.-based entity was also known as SW Design School, LLC. (Ibid.) At the same time, Weary registered K-12 Coders as

[2] In this Answering Brief, citations to the transcript appear as "Tr. [page numbers]." Citations to the General Counsel's exhibits appear as "GC Exh. [exhibit number]," and citations to Respondent's exhibits appear or "R Exh. [exhibit number]." Citations to the ALJ's decision appear as "ALJD at [page numbers]." Citations to Respondent's Exceptions and Brief appear as "Resp't Exceptions at [page numbers]."

[3] Although the website address is www.thecareerleaders.co, e-mail addresses for the Company end with .com (thecareerleaders.com). (Tr. 28:1–7.)

the trade name for the entity based in Washington, D.C. (K-12 Coders). (GC Exh. 5; GC Exh. 6; GC Exh. 9–B; GC Exh. 9–C.) K-12 Coders provides after-school programs and camps at different locations in Washington, D.C., including D.C. public schools, teaching entrepreneurial skills to students ranging from elementary school to high school. (*See, e.g.*, GC Exh. 7–C; GC Exh. 10–G at 1; GC Exh. 56 at 2; GC Exh. 57; Tr. 35:15–36:16, 243:9–17, 384:2–12, 447:20–448:4.) Weary created K-12 Coders as a pilot project to test the market and prove that a business providing after-school programs teaching entrepreneurial skills to kindergarten through 12th grade students could be successful. (Tr. 84:19–85:2, 86:8–10, 102:12–103:1, 471:16–17.)

Weary is the sole member of both the K-12 Coders and the Interns4Hire entities, and she considers the Michigan L3C to be the "exact same company" as K-12 Coders. (Tr. 33:5–15, 33:16–22, 166:22–167:4; see also GC Exh. 2–A; GC Exh. 2–B; GC Exh. 2–C; GC Exh. 4 at 2; GC Exh. 5 at 1; GC Exh. 7–C; GC Exh. 8 at 2; GC Exh. 11 at 3; GC Exh. 12 at 1–2; GC Exh. 13 at 1.) Accordingly, Weary is the person who makes business decisions, including the types of business K-12 Coders and Inters4Hire will pursue. (Tr. 33:23–34:18.) Weary also decides what types of business relationships Interns4Hire has with other business. (Tr. 35:1–4.) Interns4Hire has employees, and Weary is involved in hiring those employees and assigning them tasks. (Tr. 35:5–10; see, e.g., GC Exh. 23 at 3, 7–18.) K-12 Coders does not directly employ anyone besides Weary. (Tr. 28:8–11, 34:9–14.)

B. Respondent's After-School Programs

Since at least February, Respondent has provided after-school programs in Washington, D.C.-area schools. (See Tr. 223:23–224:21, 240:18–24, 243:3–25, 379:1–14, 384:2–385:10, 412:9–19; GC Exh. 27 at 1; GC Exh. 28 at 1; GC Exh. 30.) Respondent's after-school programs teach children skills like coding and entrepreneurship using soap and candle-making equipment,

computers, iPad programs, as well as a piece of machinery called a Cricut machine. (Tr. 36:2–16, 243:11–17, 244:24–245:13, 384:4–12, 447:20–448:4; GC Exh 3–J; GC Exh. 3–L; GC Exh. 7–C; GC Exh. 10–A; GC Exh. 10–C; GC Exh. 10–G; GC Exh. 10–H at 9; GC Exh. 51 at 10; GC Exh. 52 at 10; GC Exh. 53 at 10; GC Exh. 56 at 2; GC Exh. 57.) A Cricut machine is approximately the size of an inkjet printer. (Tr. 245:14–19; see also GC Exh. 48.) The machine has a small, removeable blade inside a cartridge which allows users to cut vinyl designs. (Tr. 505:11–13, 505:23–24, 507:25–508:2, 516:22–23; GC Exh. 48.) Respondent owned either four or five Cricut machines. (Tr. 404:20–21, 513:25–514:1.) One of Respondent's Cricut machines had been missing a blade since about January. (Tr. 379:8–11, 405:10–12.)

Because K-12 Coders has no employees of its own, Weary places Interns4Hire employees at K-12 Coders' locations. (Tr. 93:1–14, 94:20–95:15, 223:23–224:21, 240:18–24, 243:3–25, 379:1–14, 384:2–385:10, 412:9–19; GC Exh. 23 at 13, 16–17; GC Exh. 32.) Weary alone made the decision to place Interns4Hire employees at K-12 Coder job sites. (Tr. 101:24.) Although K-12 Coders does not directly employee individuals, it did maintain an employee handbook until about late June.[4] (See GC Exh. 21, GC Exh. 23 at 6; Tr. 386:22–387:1, 419:17–20, 421:19–21, 423:5–16.) Interns4Hire employees working at K-12 Coders jobsites were required to review, sign, and adhere to the rules in the K-12 Coders Handbook. (GC Exh. 21 at 2; GC Exh. 23 at 4–5; Tr. 244:9–21, 437:22–438:2, 441:7–22.) Weary also read the handbook's provisions aloud to Interns4Hire employees during training. (Tr. 456:16–25.) The K-12 Coders Handbook prohibited Interns4Hire employees from discussing their wages and working

[4] Respondent destroyed all copies of the handbook in late June, after receiving the initial charge in this matter and providing an excerpt of the handbook in Respondent's June 24 position statement to the Regional Office. (GC Exh. 23 at 6; Tr. 129:24–131:15, 134:11–24, 192:22–194:13.)

conditions with each other. (GC Exh. 21 at 2; GC Exh. 23 at 5; Tr. 252:25–253:3, 386:22–387:1, 391:13–18, 419:17–20, 421:19–20, 423:5–16, 441:7–22.)

Respondent pays its employees on an hourly basis. (See Tr. 240:11–14, 426:8–10; GC Exh. 27 at 1; GC Exh. 30.) Respondent uses a smartphone application known as "When I Work" to track attendance. (Tr. 207:1–23, 257:13, 385:16–24.) "When I Work" is a location-based smartphone application that only permits employees to clock-in or clock-out when the employees are physically present at Respondent's Capitol Heights office or after-school program job sites. (Tr. 207:1–23, 257:13, 385:16–24.) However, repeated "glitches" with "When I Work" prevented employees from properly clocking in or clocking out. (Tr. 385:24–386:5.)

On a typical day, Respondent's employees first visit Respondent's Capitol Heights facility to complete trainings and to pick up supplies for use in Respondent's after-school programs. (Tr. 243:20–25.) Employees then travel to Respondent's after-school program job locations. (Tr. 243:20–25, 259:2–21, 266:23–267:6, 391:21–392:6.) However, Respondent does not pay employees for their travel time between Respondent's Capitol Heights office and after-school program job sites. (Tr. 259:2–21, 259:2–21, 266:23–267:6, 391:21–392:5.) Instead, Respondent's travel pay policy requires employees to clock-out when they left the Capitol Heights office and clock-in when they began working at Respondent's after-school program job site. (Tr. 391:21–392:5.) At least one of the reasons that Respondent did not pay for travel time was that on-the-clock travel created a "liability" for Respondent. (Tr. 394:4–6.)

By March, Respondent began providing its after-school programs at Eastern High School and one other school in Washington, D.C. (See GC Exh. 32 (instructing Hyson to report to Eastern High School); GC Exh. 23 at 16 (mentioning a job assignment to another unnamed location.)) In about April, Respondent expanded to third school. (GC Exh. 37.) Respondent's

three school locations at the time were Eastern High School, Boone Elementary (Boone) and Navel Thomas Elementary in Washington, D.C. (Tr. 384:21–385:1; GC Exh. 10–G at 1.) At some undetermined point, Respondent's Cricut machine that was missing its blade had been transported to Boone. (Tr. 404:20–405:2.) Without the blade, Respondent's employees at Boone could not complete the Cricut station with students. (Tr. 405:5–6.)

C. Hyson's Experience With Respondent

On January 30, Hyson sent Weary an e-mail explaining that Maryland's apprenticeship program had referred him to Weary and expressing his interest. (GC Exh. 25 at 1; Tr. 222:9–21, 236:16–237:8.) Weary referred Hyson to thecareerleaders.co/apprenticeship, and Hyson completed the online application. (GC Exh. 25 at 2; GC Exh. 26 at 1; Tr. 222:9–15, 237:8–9.) Weary also requested a link to Hyson's graphic design work, and Hyson complied. (GC Exh. 25 at 2; Tr. 222:22–223:4, 237:8–12.) On February 7, Weary arranged a virtual interview with Hyson so that Weary could evaluate Hyson's skills on a hypothetical design project Weary assigned to him. (GC Exh. 26 at 3–4; Tr. 223:5–21, 237:15–238:6, 238:17–24.)

On February 14, Weary offered Hyson a position as a STEM Aide at $18 per hour. (GC Exh. 27; Tr. 224:1–3, 240:12–14.) Hyson accepted Weary's offer just 11 minutes later. (GC Exh. 27; Tr. 240:16–17.) On February 25, Hyson arrived at Respondent's Capitol Heights office to begin training. (Tr. 240:20–241:7.) Hyson met with Weary and another employee starting training that day. (Id.) Weary explained that Interns4Hire's employees would staff K-12 Coders' after-school programs teaching coding and entrepreneurship to students. (Tr.243:11–17; see also 225:1–3 (acknowledging that Weary provided details to Hyson regarding his job responsibilities and details during training).) Weary also explained that employees' workday consisted of two parts: (1) on-going training at Interns4Hire's Capitol Heights office; and (2)

field work at K-12 Coders' Respondent's after-school program job sites. (Tr. 243:20–25.) Weary also explained that employees were responsible for their own travel between locations and that reliable transportation was a job requirement. (Tr. 244:3–5.) In addition, Weary presented Hyson and the other employee in training a copy of the K-12 Coders Employee Handbook. (See Tr. 244:9–10.) Weary also stated that employees were required to sign a copy of the K-12 Coders Handbook before beginning work with Respondent. (Tr. 244:12–13; see also GC Exh. 23 at 4–5 (explaining that employees were required to sign the K-12 Coders Handbook before beginning work).) Hyson later signed a copy of the handbook. (Tr. 244:19–21.)

During Hyson's first week, Weary trained him regarding the different types of equipment that Respondent used in its after-school programs, including Respondent's Cricut machines. (Tr. 244:24–245:13.) In fact, Respondent had Hyson use the Cricut machine to produce his own company tee shirt. (Tr. 245:23–246:1.)

In March, Hyson received an offer for a temporary position with Johns Hopkins University (Johns Hopkins). (Tr. 228:7–10, 247:17–248:1, 306:7–13, 308:21–24.) Hyson asked Weary to hold his position while he worked with Johns Hopkins. (Tr. 248:1–248:3.) Weary agreed to hold Hyson's position for a month. (Tr. 228:11–12, 248:4–8.)

On April 26, Hyson sent Weary an e-mail explaining that he had completed his work with Johns Hopkins and that he was ready to return to work with Respondent. (GC Exh. 37 at 1; Tr. 228:13–16; 248:14–16.) Weary promptly welcomed Hyson back to Respondent, and she agreed that Hyson could return to the Capitol Heights office on April 30. (GC Exh. 37 at 1; Tr. 228:17–19, 248:18–19.) In addition to explaining that Hyson needed to submit additional paperwork, Weary explained that she had "completely changed the program" and expanded to a third school.

(GC Exh. 37 at 1, Tr. 248:19–21.) Finally, Weary agreed to add Hyson to Respondent's attendance software. (GC Exh. 37 at 1.)

Hyson returned to Respondent's Capitol Heights office on April 30. (Tr. 249:2–6.) When Hyson arrived, he found some familiar faces and some new faces. (Tr. 249:6–8.) One person Hyson recognized was Stacey Walker. (Tr. 249:11–12.) As Stacey Walker and Hyson sat at a table in Respondent's office, Stacey Walker explained changes that Respondent had made to the company since Hyson had briefly left to work at Johns Hopkins. (Tr. 249:13–23, 251:3–9, 389:11–12.) Specifically, Stacey Walker told Hyson that she had been promoted and taken on additional responsibilities.[5] (Tr. 251:7–9, 389:6–14.) After Hyson congratulated Stacey Walker for her promotion, Hyson asked Walker whether she had also received a raise. (Tr. 252:22–23, see also Tr. 390:9–10.) Stacey Walker refused to discuss her wages. (Tr. 252:24–25, 390:12–13.) Stacey Walker also stated that Respondent's employment policies prohibited employees from discussing wages with each other. (Tr. 252:25–253:3, 390:14–16.)

In addition, Hyson stated that he did not want to make Stacey Walker feel uncomfortable, Hyson stated that Respondent's rule was illegal under that National Labor Relations Act. (Tr. 253:5–12, 390:17–18; GC Exh. 23 at 5.) Hyson explained that the Act protected certain

[5] Stacey Walker began training with Respondent in January and began working as a STEM Aide on February 18. (Tr. 379:8–14.) Respondent promoted Stacey Walker to STEM Aide Supervisor in about April. (Tr. 379:18–24, 382:21–22, 416:3–6.) At the time, Weary met with Stacey Walker to explain her new duties. (Tr. 380:24–381:5.) Weary made Stacey Walker responsible for attendance and ensuring Respondent's employees were prepared and available for work. (Tr. 380:2–6, 381:8–12.) In about May, Respondent granted Stacey Walker authority to hire, discipline, and recommend that Respondent terminate employees. (Tr. 381:23–383:2, 416:24–417:12.) Weary specifically told Stacey Walker that she trusted Walker's instincts and decision making. (Tr. 382:7–11.) In addition, Stacey Walker served as Respondent's point person for Respondent's "When I Work" smartphone application. (Tr. 257:12–21, 260:14–20, 264:6–20, 266:16–21, 272:18–273:15, 277:11–19, 386:6–8.) Stacey Walker also created employee schedules that Weary routinely approved. (Tr. 416:13–23.) Stacey Walker left Respondent's employ in about August. (Tr. 142:7–12.)

employee rights, including the right to discuss wages. (Tr. 253:10–12, 391:2–3; GC Exh. 23 at 5.) Further, Hyson explained that a previous employer had tried to institute a rule prohibiting employees from discussing wages. (Tr. 253:16–18, 254:4–5, 390:20–25.) Hyson also explained that he had done some research at the time, found a Monster.com article explaining an employee's rights under the Act, and sent a copy of the article to his previous employer. (Tr. 253:18–254:2, 254:4–5; see 390:25–391:3.) In addition, Hyson explained that his previous employer had ultimately reversed the policy. (Tr. 254:1–5.) Hyson then e-mailed a copy of the Monster.com article to Stacey Walker. (Tr. 254:6–10, 444:23–445:12, 454:9–21; GC Exh. 38; GC Exh. 39.) Stacey Walker informed Hyson that he should bring any complaints he had regarding Respondent's wage discussion policy directly to Weary. (Tr. 393:16–21, 454:18–21; GC Exh. 23 at 5.) That same day, Stacey Walker informed Weary that Hyson had asked about Stacey Walker's wages. (See Tr. 395:6–15, 445:6–12; GC Exh. 38; GC Exh. 39.) Stacey Walker also explained that Hyson had e-mailed a copy the Monster.com article. (Tr. 445:9–12.)

Between April 30 and May 11, Hyson focused on collecting the documents Weary identified in her April 26 e-mail message. (Tr. 256:6–8.) As Hyson collected documents, he provided them to Stacey Walker. (Tr. 256:12–15, 438:21–22.) On May 2 and May 3, Hyson sought Weary's permission to not visit Respondent's Capitol Heights office. (GC Exh. 23 at 14–15.) Each time, Weary specifically instructed Hyson to contact Stacey Walker about his absence. (Ibid.) Weary stated that Hyson should contact Stacey Walker because Weary did not "handle attendance issues anymore." (GC Exh. 23 at 15; Tr. 221:17–222:8.) On May 11, Respondent placed Hyson at Boone as Center Director beginning on May 13. (Tr. 256:16–257:4; GC Exh. 23 at 17.) As a Center Director, Hyson would earn $20 per hour, rather than $18 per hour as a STEM Aide. (Tr. 257:1–4; GC Exh. 23 at 17.)

On May 13, Hyson reported to Respondent's Capitol Heights office. (Tr. 257:9–11.) Upon arriving, Hyson tried to clock-in using Respondent's smartphone app. (Tr. 257:13.) Although Hyson had a "When I Work" account, he was unable to clock-in. (Tr. 257:14–17.) Accordingly, Hyson explained his inability to clock-in to Stacey Walker, who eventually rectified the issue so that Hyson could clock-in himself. (Tr. 257:19–21, 260:14–18.)

After speaking with Stacey Walker, Hyson next introduced himself to his new co-workers at Boone, E'Amanda Walker and Niema Fields (Fields). (Tr. 258:5–8, 397:1–18.) Because E'Amanda Walker and Fields did not have their own transportation, his co-workers asked Hyson for a ride to Boone in his car each day. (Tr. 259:8–13.) When Weary arrived in the Capitol Heights office, Hyson therefore asked whether Respondent would compensate Hyson for travel time or reimburse him in any way. (Tr. 259:5–13.) Hyson expressed that his wife had been involved in a hit-and-run accident while working and had encountered problems with the worker's compensation program. (Tr. 333:18–22, 334:15–22, 336:6–9.) Hyson therefore expressed his concerns for his personal liability if an incident occurred while he traveled for work off-the-clock. (Tr. 337:6–22.) Weary stated that reliable transportation was a requirement for the job. (Tr. 259:17–19.) Weary further stated that Respondent would not reimburse Hyson for his travel expenses, but he was welcome to ask his co-workers to reimburse Hyson for the money he spent on gas. (Tr. 259:19–21.)

After Hyson and his Boone co-workers finished collecting supplies at Respondent's Capitol Heights office, they gathered Respondent's bins, crates, and K-12 Coders-branded backpacks for transport to Boone. (Tr. 260:6–13.) Respondent provided its after-school program in an art classroom at Boone. (Tr. 261:12–262:10.) The art classroom included a closet were Respondent stored supplies on-site. (Tr. 261:18–20.) Respondent had also been storing

some equipment in the classroom, including a Cricut machine. (Tr. 262:1–7; see also Tr. 62:9–11 (Weary acknowledging that Respondent stored equipment at K-12 Coders facilities).)

Once children arrived for the after-school program, Hyson taught the coding station, the iPad station, and the design station using the Cricut machine. (Tr. 262:12–20.) But when Hyson tried to use the Cricut machine, he noticed that the machine's blade and blade cartridge were missing. (Tr. 262:21–263:2.) Hyson asked his co-workers if they had seen the blade, but they had not. (Tr. 263:3–9.) However, Hyson's co-workers noted that Respondent maintained an extra Cricut machine in the Capitol Heights office and suggested the employees could use the blade cartridge and blade from a second machine until they located or replaced the blade and blade cartridge in the Cricut machine at Boone. (Tr. 263:18–21.) For the rest of the day, Hyson focused his instruction on the design software and other stations. (Tr. 263:12–15.)

When Hyson arrived for work on May 14, he was again unable to clock-in. (Tr. 264:3–7.) Again, Hyson informed Stacey Walker about the problem. (Tr. 264:9–11.) Again, Stacey Walker told Hyson that she would address the issue and let him know when he could clock-in. (Tr. 264:19–20.)

After speaking with Stacey Walker, Hyson walked to the area where Respondent stored equipment, including Respondent's Cricut machines. (Tr 264:23–265:1.) Hyson opened one of Respondent's auxiliary Cricut machines and removed its blade cartridge and blade. (Tr. 264:25–7.) Hyson then held the blade cartridge and blade above his head so that they would be visible to all those present at the Capitol Heights office. (Tr. 265:8–9.) Hyson loudly announced to those present—which included Stacey Walker, E'Amanda Walker, Fields, and employees who worked at another school—that he was taking the blade and cartridge with him to Boone. (Tr. 265:9–11, 266:7–10. But see Tr. 406:2–10 (Stacey Walker acknowledging that she was present at the time

Hyson announced he was taking the blade cartridge and blade but stating that she did not observe Hyson doing so).) Hyson was unsure of the procedure for checking equipment out of the office, and he wanted to ensure everyone knew he had taken the blade cartridge and blade from a second Cricut machine. (Tr. 265:13–25.) Hyson believed making such an announcement was a safe way to ensure those around him he knew he had taken the cartridge and blade. (Ibid.) After Hyson's announcement, Hyson placed the Cricut blade cartridge and blade in his pocket and continued gathering supplies for transport to Boone. (Tr. 266:4–6, 266:11–15.)

Weary then arrived in the office. (Tr. 266:23–24.) Weary gathered Respondent's employees and reiterated that Respondent's policy required employees to have reliable transportation. (Tr. 266:24–267:2.) Weary reiterated that Respondent did not to pay employees for their travel. (Tr. 267:2–3, 394:3–13.) Weary encouraged employees to share gas money if a co-worker provided the employee a ride to Respondent's job site. (Tr. 267:4–6, 394:7–13.)

After Weary's announcement, Hyson and his Boone co-workers prepared to leave the office. (Tr. 267:9–10.) Just before loading the supplies in Hyson's car, Hyson took the Cricut blade cartridge and blade out of his pocket. (Tr. 267:15–21.) Hyson then placed the blade cartridge and blade in a six- or seven-inch-deep side pocket of one of the K-12 Coders-branded backpacks employees used to transfer supplies from the Capitol Heights office. (Tr. 267:18–21, 268:21–269:4.) Because E'Amanda Walker held the backpack at the time, Hyson told her that he was putting the blade cartridge into the pocket of the backpack. (Tr. 267:16–268:1.)

Unfortunately, Hyson and his co-workers learned that the blade cartridge and blade had gone missing when they began setting up the Boone art classroom for Respondent's after-school program. (Tr. 268:11–20.) Hyson, E'Amanda Walker, and Fields searched the classroom and the backpacks they had brought to Boone. (Tr. 269:8–269:16.) Hyson even returned to his car to

search for the blade cartridge and blade. (Tr. 269:19–269:4.) But Hyson and his co-workers could not locate either piece. (Tr. 269:15–17, 270:3–4.) Hyson stated that he believed the blade cartridge and blade were his responsibility, that he would continue searching for them, and that he would let Respondent know if he could not find them and that he would buy a replacement. (Tr. 270:14–19.) E'Amanda Walker and Fields agreed with Hyson's plan. (Tr. 270:20–21.)

At the end of Respondent's after-school program on May 14, Hyson learned that he needed to return Respondent's laptop computers to the Capitol Heights office to be charged. (Tr. 270:24–271:9.) When Hyson arrived at the office, he found Respondent's door was locked. (Tr. 271:20–21.) Hyson pounded loudly on the door, and the owner of the print shop with whom Respondent shared the Capitol Heights office eventually unlocked the door. (Tr. 272:2–5.) That experience—transporting Respondent's equipment while off-the-clock—concerned Hyson. (Tr. 271:15–17, 271:22–272:1, 272:9–17.) After Hyson arrived at home, he conducted internet research to learn about employees' rights to be paid for their travel time. (Tr. 272:9–17.)

On May 15, Hyson was again unable to clock-in when he arrived for work. (Tr. 272:18–273:19.) Hyson again informed Stacey Walker of the problem, and she again agreed to address the issue. (Tr. 273:23–274:15.) But this time, Hyson's conversation with Stacey Walker continued when Hyson asked Stacey Walker to discuss Respondent's travel pay policy. (Tr. 273:16–274:4, 393:12–15.) Hyson explained the issues he had encountered returning Respondent's laptops the previous evening, and he stated that he was concerned that Respondent's policy required employees to travel between locations while off-the-clock. (Tr. 273:24–274:3.) Walker responded that Weary had stated Respondent's travel pay policy many times and that employees' travel time between the Capitol Heights office and their job site was to be considered a lunch break. (Tr. 274:6–11, see 392:21–393:5.) Hyson disagreed, stating

that he could simply take his lunch break at the Capitol Heights office and that Respondent was requiring Hyson to travel to another location during his lunch break. (Tr. 274:13–20.) After Stacey Walker told Hyson that she could not do anything about the policy, Hyson was dissatisfied and explained that he would continue researching the travel pay policy issue and let Stacey Walker know what he learned. (Tr. 274:21–275:8.) Stacey Walker again informed Hyson that he should discuss any issues regarding the policy with Weary. (Tr. 393:13–15, 394:1–2.) Stacey Walker also informed Weary that Hyson had expressed concerns regarding Respondent's travel pay policy. (Tr. 394:2–3, 394:14–23.)

After Hyson's conversation with Stacey Walker, Hyson and his Boone co-workers gathered their supplies and packed Hyson's car to travel to Boone. (Tr. 276:1–4.) On the way, E'Amanda Walker and Fields each gave Hyson $20 in gas money for the week. (Tr. 276:14–17.) Hyson first thanked E'Amanda Walker and Fields for their generosity. (Tr. 276:20–21.) Hyson then stated that he did not believe it was fair for Respondent to ask E'Amanda Walker and Fields to provide Hyson with gas money when Hyson believed it was Respondent's responsibility to pay all three employees for their travel. (Tr. 276:21–24.) As Hyson recalled, E'Amanda Walker and Fields responded with "mild disinterest." (Tr. 277:3–4.)

In a telephone call later that day, E'Amanda Walker and Fields told Stacey Walker and Weary that Hyson had discussed Respondent's travel pay policy. (See Tr. 397:24–398:4, 399:6–14, 399:24–400:22, 403:15–19). Stacey Walker also testified that E'Amanda Walker and Fields told Stacey Walker and Weary that Hyson had asked E'Amanda Walker and Fields about their pay. (Tr. 397:24–398:5, 399:6–14.)[6]

[6] Although E'Amanda Walker and Fields informed Respondent that Hyson asked them about their pay, Hyson did not testify about such inquires.

At 7:30 p.m. on May 15, Stacey Walker sent Weary a text message regarding the misplaced Cricut blade cartridge (GC Exh. 1–I at 23.)[7] Stacey Walker explained that E'Amanda Walker told Stacey Walker that Hyson had lost the blade after having it in his pocket. (Ibid.) Stacey Walker also claimed that Hyson told E'Amanda Walker not to say anything until the Boone employees found the missing blade. (Ibid.) Weary responded only that Respondent should let Hyson go. (Ibid.)

However, Respondent took no such steps when Hyson arrived for work on May 16. Instead, Hyson's day began as it had every other day that week: Hyson was unable to clock-in for work. (Tr. 277:9–11.) Once again, Hyson spoke with Stacey Walker about his inability to clock-in. (Tr. 277:14–17.) Once again, Stacey Walker stated that she would take care of the issue. (Tr. 277:18–19.) Hyson was later able to clock-in that day. (Tr. 280:20–21.)

When Weary arrived, she called a staff training about how to connect Respondent's projector to a company laptop, as well as the best practices for teaching one of Respondent's coding programs. (Tr. 278:5–14, 407:20–23.) Stacey Walker led the training. (Tr. 279:21–23.) Because Hyson already knew the skills Stacey Walker was teaching, he passed the time using his smartphone to access Facebook. (Tr. 279:11–20.) Weary saw Hyson on his smartphone and asked if he was recording the meeting. (Tr. 279:8–10, 407:20–23.) Hyson stated that he was not. (Tr. 280:6, 280:11–13.) Weary stated that she did not consent to any recording and such recordings would be inadmissible in court. (Tr. 280:8–10.)

After the training, Weary asked Hyson and Stacey Walker to attend a separate meeting. (Tr. 280:17–19, 407:11–17.) Weary began the meeting by accusing Hyson of complaining about

[7] The text message received in evidence is an excerpt which does not reflect the entirety of Stacey Walker and Weary's dialogue.

Respondent's wage discussion and travel pay policies to his co-workers. (Tr. 281:4–6, 284:7–10, 407:24–408:14.) Weary stated that she knew Hyson was complaining about Respondent's policies, and Hyson confirmed that he had. (Tr. 281:8–13, 408:15–18.) Weary stated that Hyson should have brought any concerns to Weary and Weary alone. (Tr. 281:14–16; see 408:19–21, 409:16–24.) Weary claimed in passing that Hyson had stolen a blade from Respondent's Cricut machine, but Hyson explicitly stated that he had not.[8] (Tr. 281:21–282:12; 284:3–5.) Hyson also explained that he had only taken the Cricut blade cartridge and blade because the Cricut machine that had been at Boone was already missing its blade. (Tr. 282:7–12.) Having heard Hyson's explanation, Weary stated that she was letting that issue go because Hyson had discussed Respondent's policies behind her back and shown himself to be untrustworthy. (Tr. 282:14–18, 283:3–7.) Weary further stated that Respondent's handbook prohibited employees from discussing wages, and that Hyson had signed away any right to discuss wages when he signed Respondent's handbook. (Tr. 283:3–7.) Although Hyson explained that maintaining such a rule was illegal, Weary reiterated that Hyson had signed away his right to discuss wages. (Tr. 283:9–18.) Further, Weary stated that Maryland was an at-will employment state, so she could fire Hyson for any reason at any time. (Tr. 283:18–21.) Weary then stated that she did not owe Hyson any explanation beyond that she did not trust him. (Tr. 283:21–23.)

[8] Weary's accusation was the first time either Weary or Stacey Walker ever mentioned the missing Cricut blade cartridge and blade to Hyson. (Tr. 284:23–285:5.) Although Stacey Walker testified that she asked Hyson about the blade (Tr. 406:24–407:1), Stacey Walker's text message to Weary indicates that Stacey Walker did not learn about the misplaced blade cartridge until the evening of May 15, which was the night before Hyson's termination meeting. (GC Exh. 1–I at 23.) Stacey Walker also later clarified her testimony. Stacey Walker testified that she asked Hyson why he had not explained that he had taken a second Cricut blade cartridge to replace the missing blade in the machine at Boone. (Tr. 431:18–21.) In response, Stacey Walker testified that Hyson did not give "us" a response besides that Hyson did not know that he had to do so. (Tr. 431:22–24.) Given the timeline and Stacey Walker's reference to "us," the evidence demonstrates that Stacey Walker did not question Hyson until his May 16 termination meeting.

Therefore, Weary continued, Hyson was fired. (Tr. 283:23.) Weary also told Hyson that she did not have any complaint about the quality of his work. (Tr. 284:14–18.) Respondent did not provide Hyson with any written documentation of his termination. (Tr. 284:20–22.)

On June 18, Hyson filed the initial charge in this matter. (GC Exh. 1–A.) On June 24, after receiving a copy of Hyson's initial charge and the Board's docketing letter, Weary submitted an unprompted statement to the investigating Board agent. (GC Exh. 23 at 1–3; GC Exh. 17; GC Exh. 18.) Respondent's June 24 position statement set forth the reasons Respondent terminated Hyson. (GC Exh. 23 at 4–5.) Respondent's June 24, position statement did not include *any* reference to the Cricut machine at all, let alone as a basis for Hyson's termination. (See generally GC Exh. 23.)

The Acting Regional Director issued a Complaint and Notice of Hearing (Complaint) alleging that SW Design School, LLC d/b/a Interns4Hire.com, K-12 Coders, and SW Design School, L3C (Respondent) violated Section 8(a)(1) of the Act in four ways: (1) by promulgating and maintaining a rule on about April 30, 2019, prohibiting employees from discussing wages and compensation; (2) telling employees that they could not discuss wages with each other; (3) discharging Hyson because he violated Respondent's rule prohibiting employees from discussing wages; and (4) discharging Hyson because he engaged in protected concerted activities or because Respondent mistakenly believed Hyson engaged in protected concerted activities. The case was tried before the ALJ on February 24–25 and March 4–5, 2020. At the outset of the hearing on February 24, 2020, counsel for the General Counsel offered—and the ALJ

admitted—an Amended Complaint into the record. (GC Exh. 500 at 4; see also Tr. 16:12–15, 17:9–10.)[9]

On June 8, 2020, the ALJ issued his decision concluding that Respondent constituted a single business enterprise within the meaning of the Act. (ALJD at 18:38–40.) The ALJ also concluded that Respondent violated Section 8(a)(1) by: (1) maintaining a rule prohibiting employees from discussing their wages; (2) enforcing the rule prohibiting employees from discussing their wages by telling employees on April 30, 2019, that Respondent's rules prohibit employees from discussing their wages; and (3) discharging Hyson on May 16, 2019, for engaging in protected activities.[10] (Id. at 18:42–19:1.) In addition to determining that the unfair labor practices affected commerce within the meaning of section 2(6) and 2(7) of the Act, the ALJ concluded that Respondent had not otherwise violated the Act as alleged in the Complaint. (Id. at 19:3–6.) The ALJ issued an errata on June 10, 2020, correcting typographical errors in the ALJD. Respondent and Counsel for the General Counsel each filed Exceptions to the ALJD on July 27, 2020.

[9] GC Exhibit 500 inadvertently plead the third amended charge as having been filed on February 13, 2019, instead of February 13, 2020. However, the formal papers include the charge and the Region's docketing letter which transmitted a copy of the charge. (GC Exh. 1–N; GC Exh. 1–P.) The third amended charge and the Region's docketing letter are properly dated. (GC Exh. 1–N; GC Exh. 1–P.)

[10] The ALJ's conclusion appears to be based on his analysis of whether the Employer terminated Hyson pursuant to an unlawful rule rather than protected concerted activity. (See ALJD at 14:12–17:34.)

III. ARGUMENTS

A. The ALJ Explicitly Considered and Rejected Respondent's Wholly Pretextual Justifications For Terminating Hyson (Respondent's Exception 1 and 2)

The ALJ appropriately considered the record evidence and conclusively rejected each of Respondent's scattershot and pretextual justifications for terminating Hyson on May 16. The Amended Complaint alleged that Respondent unlawfully terminated Hyson in two ways: (1) because Hyson engaged in, or Respondent mistaken believed Hyson engaged in, protected concerted activities; and (2) because Hyson violated Respondent's unlawful rule prohibiting employees from discussing wages and compensation. (GC Exh. 500 at 4–5.) The ALJ applied a dual-motive analysis to the Amended Complaint's first allegation under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d (1st Cir. 1981), cert. denied 445 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). (ALJD at 11:26–37, 15:1–4.) Although the ALJ erroneously concluded that Hyson did not engage in protected concerted activity, the ALJ specifically concluded Respondent's affirmative defenses were not credible based on the weight of the evidence. (Id. at 14:45–15:1, 16:31–32.)

The ALJ analyzed the Amended Complaint's second theory under *Continental Group, Inc.*, 357 NLRB 409, 410 fn. 6 (2011). (ALJD at 16:44–17:13.) The ALJ observed that the record contained "no evidence that Hyson sought to be discharged," and he concluded that "the proffered reason for discharge" was "pretextual and attributable to Hyson's complaints regarding Respondent's no-wage discussion rule." (ALJD at 17:40–18:1.) Further, the ALJ concluded "there was no credible evidence offered to support the contention that Hyson's assertion of Section 7 right to discuss wages interfered with operations." (Id. at 18:17–18.) Thus, the ALJ concluded that Respondent violated Section 8(a)(1) when Respondent discharged Hyson for

exercising "his Section 7 rights by complaining about an unlawful rule prohibiting employees from discussing wages." (Id. at 18:33–34.)

Respondent's exceptions simply reprise the repeatedly shifting and pretextual reasons Respondent claimed as bases for terminating Hyson throughout each stage of this case with varying levels of consistency and emphasis, and which the ALJ properly refused to credit. Respondent apparently hopes that such a scattershot approach will disparage Hyson with the Board just enough to substitute for what Respondent could not—and did not—show at the hearing: that it was more likely than not Respondent would have terminated Hyson even absent his protected concerted activity or Respondent's mistaken belief that Hyson engaged in protected concerted activity under *Wright Line*. Likewise, Respondent could not—and did not—show that Hyson actually interfered with employees' work, interfered with Respondent's operations, or that any interference was the reason for Hyson's discharge, rather than his violation of Respondent's unlawful rule under *Continental Group*. Notwithstanding Respondent's cavalcade of pretextual excuses, the record and the ALJ's decision in the case demonstrate that the ALJ appropriately considered and rejected the Respondent's affirmative defenses.

1. The ALJ's *Wright Line* Analysis Appropriately Concluded That Respondent's Pretextual Claims Regarding the Cricut Blade Were Not Credible

Respondent's first exception erroneously claims that the ALJ failed to consider Weary's carefully cropped and out-of-context text message with Stacey Walker on May 15 that excises any preceding or follow-up messages. (Resp't Exceptions at 1–2.) But in fact, the ALJ explicitly considered—and, in fact, quoted—the May 15 text message in his findings of fact. (ALJD at 7:28–32.) Although the ALJ incorrectly determined that Hyson had not engaged in concerted activity as part of his *Wright Line* analysis, the ALJ also explicitly rejected

Respondent's affirmative defenses that it terminated Hyson based on theft or attendance. Thus, the ALJ simply, and appropriately, recognized the inherent flaws in Respondent's evidence, concluding that Respondent's defenses were "not supported by the weight of the credible evidence." (ALJD at 15:1.) Respondent may wish that the ALJ had viewed the May 15 text message differently, but the plain text of the ALJD therefore demonstrates that Respondent's first exception is flatly wrong.

Moreover, the record in this matter overwhelmingly supports the ALJ's refusal to credit Respondent's pretextual defenses regarding the Cricut blade. Indeed, Respondent presented *no* specific evidence demonstrating that *any* of Respondent's related entities fired any employee for any conduct whatsoever. In fact, the only reference to *any* termination came in passing reference to Stacey Walker's responsibilities as a 2(11) supervisor. But Respondent presented no information about why—or, just as importantly, when—Respondent terminated any other employees. Absent details regarding even a single comparator showing prior consistent treatment, Respondent simply cannot meet its affirmative defense burden under *Wright Line* of showing it is more likely than not Respondent would have terminated Hyson even absent his protected concerted activity.[11] *See, e.g.*, *Rhino Northwest, LLC*, 369 NLRB No. 25, slip op. at 3 (2020) ("[A]n employer cannot simply present a legitimate reason for its action but must

[11] In this regard, Respondent presented no basis to conclude Respondent would have terminated Hyson for *any* of the shifting and pretextual bases Respondent claimed throughout the investigation, hearing, or briefing in this case. In fact, Respondent entirely abandoned its transparently contrived arguments that Respondent had terminated Hyson for harassing his co-workers, recording Respondent's trainings, or causing discord. (Tr. 470:10–13, 473:20; Respondent's E-Filed Closing Statement at 5–6.) Notwithstanding Respondent's attempt to revive those arguments in Exception 2, Respondent abandoned those defenses before the ALJ. Thus, Respondent cannot credibly argue or establish that it would have terminated Hyson for any reason it so readily abandoned at hearing. That none of those reasons arose during Hyson's termination meeting only further demonstrates that Respondent cannot establish an affirmative defense as to harassment, recording during training, or discord.

persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.") (internal quotations omitted) (quoting *Consolidated Bus Transit*, 350 NLRB 1064, 166 (2007), enfd. 577 F.3d 467 (2d Cir. 2009)).

But even beyond that critical shortcoming, Respondent has entirely failed to establish that it would have terminated Hyson for alleged theft even absent protected concerted activity. Respondent's June 24 position statement—a statement Respondent hoped would convince a federal law enforcement agency that Respondent had not violated the law as alleged—did not state that Hyson had been fired for stealing a piece of the Cricut machine. Indeed, Respondent's position statement omitted *any* reference to the Cricut machine at all. Respondent did not even attach the out-of-context and carefully cropped screenshot that Respondent later attached to its Answer in a last-gasp effort to distract the Board from Respondent's true—and manifestly unlawful—motive: Respondent's animus against Hyson's protected concerted activities and the activities in which Respondent mistakenly believed that Hyson engaged. In this regard, Respondent's 11th-hour smokescreen regarding the Cricut machine in its Answer and at hearing is wholly ineffective. On the contrary, Respondent's late-in-the game focus on the Cricut machine only places Respondent's earlier failure to even *mention* the machine in its June 24 position statement in sharper relief. It strains credulity to suggest Respondent would have terminated Hyson for any conduct related to the Cricut machine even absent protected concerted activity when Respondent wholly omitted any mention of the machine to federal investigators just five weeks after Hyson's termination. For this reason alone, the Respondent cannot establish its affirmative defense as to the Cricut machine.

Beyond Respondent's failure to even mention the Cricut machine in its June 24 position statement,[12] the lodestar of Respondent's Cricut machine rationale—a carefully cropped screenshot of a text message exchange with Stacey Walker—is fatally flawed. The screenshot Respondent presented completely excised *any* preceding or follow-up messages. Without more, it is unclear why Weary immediately concluded Hyson had stolen—rather than misplaced—the Cricut blade and cartridge. It is also unclear whether Weary and Walker's larger exchange included a discussion of Hyson's protected concerted activities or the activities in which Respondent mistakenly believed Hyson had engaged. But given Respondent's admission that it destroyed the K-12 Coders Employee Handbook after receiving the initial charge in this case while preserving evidence that Respondent believed supports its defense, the Board should conclude that the May 15 screenshot does *not* tell the whole story.[13]

[12] The ALJD and record evidence also demonstrate that during the May 16 termination meeting, Weary specifically disavowed the Cricut blade as a basis for terminating Hyson. (Tr. 282:14–18, 283:3–7; see also ALJD at 8:12–14 (explaining that Weary pivoted back to her belief that Hyson was untrustworthy because he discussed Respondent's policies).

[13] The General Counsel's subpoenas duces tecum specifically requested documents underlying any investigation of Hyson, as well as documents Respondent relied upon in deciding to discharge Hyson, copies of any and all complaints regarding Hyson, and documents discussing complaints, and documents regarding the Cricut machine. (GC Exh. 200 at 9, 20, 31, 41; GC Exh. 201 at 8; GC Exh. 202-B at 8; GC Exh. 203 at 8.; GC Exh. 205 at 5–6, 13–14, 21–22, 29–30; GC Exh. 206 at 4–5; GC Exh. 207 at 4–5; GC Exh. 208 at 4–5; GC Exh. 209 at 4–5.) Nevertheless, Respondent explained that it limited its search for documents to Weary's thecareerleaders.com e-mail address and Weary's text exchanges with Hyson and Stacey Walker. (Tr. 199:7–201:18, 202:25–205:3.) In this regard, Respondent did not produce—or even search for—any text messages, hand-written notes, or e-mail messages with E'Amanda Walker or Fields. Despite the General Counsel's detailed subpoena requests, Weary's acknowledgement that she communicated with Respondent's staff via text message and e-mail (see Tr. 194:23–195:3, 201:19–25), and Weary's testimony that she maintains copies of e-mail messages back to 2009 (see Tr. 198:22–199:11), the single e-mail or text exchange with Stacey Walker that Respondent produced was Stacey Walker's out-of-context text-message explanation that the Cricut blade cartridge had been misplaced. Respondent's failure to comply with the General Counsel's subpoena requests only further supports the ALJ's refusal to credit Respondent's patently pretextual defense.

But Respondent's failure to identify any issue related to the Cricut machine is not the only flaw in Respondent's affirmative defense. Stacey Walker's May 15 text message stated only that Hyson had misplaced the blade cartridge. Just after learning of Hyson's conversations with E'Amanda Walker and Fields, and without any investigation at all, Weary suggested that Respondent would let Hyson go. But neither Weary, nor Stacey Walker took any steps to terminate Hyson the following morning. Instead, Respondent permitted Hyson to attend a training meeting—a step that is not consonant with intending to terminate Hyson based solely on Stacey Walker's text message. Further, by the time Respondent did hold Hyson's termination meeting, Respondent paid mere lip service to the Cricut blade. As even Stacey Walker acknowledged, Respondent terminated Hyson because he had discussed Respondent's policies with his co-workers, rather than directly with Weary.[14]

In view of the above, Respondent therefore cannot—and did not—satisfy its burden of establishing by the preponderance of the evidence that Respondent would have terminated Hyson even absent his protected concerted activity. On the contrary, Respondent seized on Stacey Walker's text message after-the-fact in the hopes of finding some lawful explanation for Respondent's patently unlawful decision to terminate Hyson because he engaged in protected activities and Respondent mistakenly believed he engaged in protected concerted activities. The ALJ therefore appropriately considered and refused to credit Respondent's wholly pretextual defense regarding the Cricut blade.

[14] Weary was present for the entirety of Hyson and Stacey Walker's testimony. Despite testifying in narrative form during Respondent's case, Weary tellingly did not dispute Hyson and Stacey Walker's testimony regarding the termination meeting. (See ALJD at 8 fn. 27.) Weary's failure to provide *any* contradictory testimony as to the termination meeting only further supports the ALJ's conclusion that Respondent's affirmative defense regarding the Cricut blade was not credible.

2. The ALJ's *Wright Line* Analysis Appropriately Concluded That Respondent's Pretextual Claims Regarding Hyson's Attendance Were Not Credible

Turning to Respondent's other claimed basis for terminating Hyson, the record again demonstrates that ALJ appropriately refused to credit Respondent's pretextual defense regarding Hyson's attendance. (ALJD at 15:1.) Despite having all three participants in Hyson's termination meeting present for the hearing, Respondent presented *no* evidence that Weary referenced attendance as a basis for Hyson's termination at all. Respondent's failure to even mention attendance during Hyson's termination shows Respondent's attendance justification to be entirely pretextual. *See, e.g.*, *Horseshoe Bossier City Hotel & Casino*, 369 NLRB No. 80, slip op. at 2 fn. 14 (2020) (concluding that an employer has not met its affirmative defense burden where evidence shows the employer did not rely on its affirmative defense).

Moreover, the evidence that *was* adduced at hearing also falls well short of establishing Respondent would have terminated Hyson for his attendance even absent protected concerted activity or its mistaken belief about his protected concerted activity. In fact, Respondent's attendance argument has been flawed from the beginning. Although Respondent's position statement claimed that Hyson's "biggest issue" prior to his brief absence to take a position with Johns Hopkins was his attendance (GC Exh. 23 at 3), Respondent did not simply welcome Hyson back in late-April. (*See* GC Exh. 23 at 14–5, 17–18; GC Exh. 37.) Rather, Respondent made Hyson a Center Director rather than a STEM Aide even after Hyson requested additional time off. (GC Exh. 23 at 14–15, 17–18.) Respondent also increased Hyson's hourly wage rate from $18 to $20 per hour. (Id. at 17.) Respondent's decision to give Hyson a new title and more money—despite what Respondent claims were significant and on-going attendance issues—weighs strongly against concluding that Respondent took attendance so seriously that

Respondent would have terminated Hyson even absent his protected concerted activity or its mistaken belief about his protected concerted activities.

In addition, Respondent's position statement makes no reference to Hyson's clock-in or clock-out times when claiming Hyson had "attendance" issues. Respondent's position statement includes only dates Hyson was unable to work. (GC Exh. 23 at 10, 14–15, 17–18.) In fact, Respondent did not present Hyson's timesheet until *after* the Board investigator prompted Respondent to do so. (GC Exh. 18 at 2; GC Exh. 19.) Yet even when Respondent presented the timesheet on July 26, Respondent did not explain how or why Hyson's clock-in or clock-out times could have been the basis for termination. Accordingly, Respondent cannot credibly claim that Respondent would have terminated Hyson for generalized "attendance" issues even absent Hyson's protected concerted activities or Respondent's mistaken belief that Hyson engaged in protected concerted activities. Instead, Respondent's failure to include Hyson's timesheet among the documents provided with Respondent's position statement further demonstrates Respondent's post-hoc attendance rationale to be pretextual.

Further, Hyson credibly testified regarding his understanding of his working hours. Hyson explained that on his first day of training, Weary stated that employees were to report to the Capitol Heights office for an unspecified amount of time before reporting to a school. (Tr. 243:21–24). Hyson further testified that he was told his time at Respondent's Capitol Heights office was open-ended. (Tr. 315:7–12.) Hyson also explained he had been told he could arrive at Respondent's Capitol Heights office as early as 10:00 a.m. but was not required to arrive at any specific time. (Tr. 316:15–16, 318:11–15.)

Although Stacey Walker testified that employees received e-mail messages regarding their weekly schedules (Tr. 418:12–13), Respondent failed to present any such e-mail for any

employee. Respondent also failed to provide such documents in response to the General Counsel's post-Complaint subpoenas duces tecum. (*See* GC Exh. 200 at 7–8, 18–19, 29–30, 39–40 (requesting "[d]ocuments drafted, typed, e-mailed, signed, written by, or based in whole or in part on information provided or authorized by Tarsha Weary or Stacey Walker that relate to . . . the assignment of work to and/or the scheduling of work for any employees or workers employed by Respondent . . . ."); GC Exh. 201 at 6–7 (same); GC Exh. 202-B at 6–7 (same); GC Exh. 203 at 6–7; GC Exh. 203 at 6–7 (same). Respondent's failure to provide documents responsive to subpoena or introduce any such documents into the record again supports the ALJ's conclusion that Respondent's affirmative defense as to Hyson's attendance was not credible.

Notwithstanding Stacey Walker's testimony that Respondent's employees worked at Respondent's Capitol Heights office between 10:00 a.m. and 12:00 noon, Respondent's February 17 job offer to Hyson also demonstrates Hyson reasonably understood his working hours to be flexible. Although Respondent's job offer in February suggests working hours between 10:00 a.m. and 6:00 p.m., the record conclusively demonstrates that employees did not work for that entire eight-hour span. (*See, e.g.*, Tr. 392:21–393:10 (explaining that Respondent did not pay employees for their travel time between the Capitol Heights office and K-12 Coders' job sites).) In fact, Weary's e-mail message transmitting Hyson's job offer explained that "[t]hose hours are not concrete. You may leave earlier on some days, but I wanted you to make yourself available during those times." (GC Exh. 28 at 1.)

In addition, Respondent did not in any way explain Hyson's timesheet for the week of May 13 through May 18, which shows only Hyson's clock-in and clock-out times and the total number of hours scheduled. (GC Exh. 19 at 2.) But regardless of Respondent's contention that

employees were scheduled to be in the Capitol Heights office from 10:00 a.m. to 12:00 noon and then at a school between 2:00 p.m. and 5:30 p.m., Hyson's time sheet does not identify times Hyson was scheduled to arrive at each location. (Ibid.) Instead, Hyson's timesheet indicates that he was "scheduled" for only 3.5 hours per day on May 13, May 14, and May 15. (GC Exh. 19 at 2.) Given the 3.5 hour span from 2:00 p.m. to 5:30 p.m. that Respondent's after-school programs typically covered (s*ee* Tr. 393:6–8, 398:25–399:1), Hyson's timesheet actually weighs in favor of crediting Hyson's testimony that employees were permitted, but not required, to clock-in at the Capitol Heights office before heading to their assigned K-12 Coders job site.

But even if Respondent *did* require employees to work in Respondent's Capitol Heights office *precisely* between 10:00 a.m. and 12:00 noon, the record in this matter significantly undercuts Respondent's claim that it would have terminated Hyson for his attendance. Neither Stacey Walker, nor Weary ever informed Hyson that his arrival times were a problem. Instead, Stacey Walker simply allowed Hyson to continue to arrive late every day.[15] Accordingly,

[15] At hearing, Respondent tried to elicit testimony from Hyson that he had arrived at the Capitol Heights office after his scheduled start time on May 13, May 14, May 15, and May 16. (Tr. 318:16–320:7.) Hyson credibly testified to his understanding that his arrival time at Capitol Heights was flexible. (Tr. 318:11–15; *see also* GC Exh. 19 at 2 (Hyson's timesheet showing no specific clock-in times).) Accordingly, Respondent's complete lack of remedial action supports a conclusion that Hyson did *not* have a scheduled start time.

But Respondent's questioning implicitly acknowledged that, even in Respondent's self-serving, post-hoc rationalization, Hyson's claimed start time was 12:00 noon rather than 10:00 a.m. Nevertheless, Respondent entirely failed to establish even this much more minor punctuality issue. Hyson credibly testified that he could not clock-in using Respondent's smartphone attendance application each time he arrived at the Capitol Heights office during the week of May 13. (Tr. 257:9–14, 264:3–7, 272:18–19, 277:11–17.) Stacey Walker also acknowledged that Respondent's time-keeping application had repeated "glitches" that prohibited employees from clocking-in and clocking-out. (Tr. 385:24–386:5.) Although Stacey Walker later testified in response to a hypothetical question that she clocked-in late-arriving employees at the time the employee arrived (Tr. 419:1–16), she provided *no* testimony that she *ever* did so for Hyson. Further, Hyson further testified that he was eventually able to clock-in *himself* after speaking with Stacey Walker. (Tr. 258:15–17, 260:14–18, 264:18–20, 266:16–21, 276:5–12, 280:20–21.) Hyson's clock-in times each day therefore reflect the times Stacey

Respondent did not appear to view Hyson's attendance to be a problem until Hyson engaged in protected concerted activity and Respondent began to mistakenly believe Hyson engaged in protected concerted activity. In view of the above, the ALJ appropriately found Respondent's claimed attendance defense under *Wright Line* to be non-credible.[16]

Walker alerted Hyson he could clock-in, rather than his arrival time. In this regard, Hyson's supposed "attendance" problems reflect instead a breakdown in Respondent's timekeeping system.

[16] Respondent's second exception also argues that Weary told Stacey Walker that Respondent would "ignore the conversation until Mr. Hyson brings it to Ms. Weary's attention." (Resp't Exceptions at 3 (citing Tr. 409:15–24.)) Because Hyson did not bring his concerns directly to Weary, Respondent contends that "General Counsel didn't establish intent, and the ALJD did not take that testimonial under consideration when ruling that employees were told by management to not discuss wages." (Resp't Exceptions at 3.) As a threshold matter, Respondent's transcript citation mischaracterizes the testimony Respondent cited; the cited testimony reflects Stacey Walker's testimony regarding Hyson's termination meeting. Yet even if the Board believes that Respondent intended to cite another portion of Stacey Walker's testimony, Respondent's argument ignores the distinction between 2(11) supervisors and 2(3) employees. See, e.g., *Capital Times Co.*, 234 NLRB 309, 309–310 (1978) (explaining that employees cannot engage in protected concerted activities within the meaning of Section 7 with nonemployees who are not entitled to the protection of the Act)

More importantly, Respondent ignores Hyson's subsequent campaign to improve employee working conditions. Regardless of whether Respondent may have been willing to overlook an isolated complaint to a 2(11) supervisor and 2(13) agent like Stacey Walker, Hyson's continued campaign expanded to employees. In this regard, Respondent's earlier decision to hire Hyson despite his April 30 criticism of Respondent's policy do not insulate Respondent's later decision to terminate Hyson after he engaged *employees* to improve their working conditions. Further, Respondent's emphasis on whether Hyson brought his criticisms to Weary directly only reinforces a conclusion that Respondent held animus against Hyson's later conversations with E'Amanda Walker and Fields regarding Respondent's unlawful policies. As Stacey Walker testified regarding Hyson's termination meeting: "I felt like if he had gone to her . . . with his concerns, it might have come out a different way." (Tr. 409:22–24.)

To the extent the Board construes Respondent's argument to be that Respondent did not unlawfully tell employees that they could not discuss wages or compensation because Stacey Walker made such a statement, rather than Weary, Respondent overlooks the Amended Complaint's allegation that Stacey Walker was Respondent's supervisor and agent under Section 2(11) and 2(13) of the Act. Although the ALJ inadvertently failed to conclude formally that Stacey Walker was a 2(11) supervisor and 2(13) agent, the ALJ correctly found that Respondent made Stacey Walker responsible for attendance and scheduling when Respondent promoted Stacey Walker to STEM Aide Supervisor in April. (ALJD at 5 fn. 12.) The ALJ also correctly found that Respondent authorized Stacey Walker to hire, discipline, and recommend the termination of employees in about May. (Ibid.) Further, the ALJ found that Stacey Walker

3. The ALJ Appropriately Concluded That Respondent Had Not Established an Affirmative Defense Under *Continental Group*

The ALJ also appropriately considered and rejected Respondent's pretextual claims in his *Continental Group* analysis. The ALJ characterized Weary's reference to the Cricut blade during Hyson's termination meeting as a "passing accusation" and observed that Weary discounted the blade as a "secondary issue." (ALJD at 17:34–36.) Likewise, the ALJ observed that there was "no evidence Hyson sought to be discharged," and concluded that Respondent's "proffered reason for discharge" was "pretextual." (ALJD at 17:40–18:1.) Further, the ALJ again correctly observed that "there was no credible evidence offered to support the contention that Hyson's assertion of his Section7 right to discuss wages interfered with operations." (ALD at 18:17–18.)

Moreover, the record and Board precedent fully support the ALJ's conclusions. The Board has explained that an employer's work rules may violate Section 8(a)(1) for a number of

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acted as Respondent's "point person" for Respondent's smartphone timekeeping application. (Ibid.) Later in the ALJD, the ALJ observed that "Hyson's discussion on whether Stacey Walker received a raise when she was promoted occurred after the supervisor's change in job title and duties and removed her from employee status. As such, Hyson's initial conversation about wages and hours was not concerted action with another employee." (Id. at 16:13–16.) The ALJ further observed that "[b]ecause these actions occurred with a supervisor instead of an employee, Hyson's actions did not amount to concerted activity." (Id. at 16:18–20.) Moreover, the ALJ's factual findings explained that on April 30, Stacey Walker stated "the Respondent's employment policy prohibited employees from discussing wages with each other." (Id. at 5:6, 5:8–9.) The ALJ's conclusions of law also state, in reference to Stacey Walker's conversation with Hyson, that Respondent "violated Section 8(a)(1) of the Act by . . . telling employees on April 30, 2019 that Respondent's rules prohibit employees from discussing their wages." (Id. at 18:42–44.)

In this regard, the record and the ALJD fully support a conclusion that Stacey Walker acted as Respondent's 2(11) supervisor and 2(13) agent. Because Respondent has not excepted to these findings and conclusions, Respondent has waived them for all purposes under the Board's Rules and Regulations. See Section 102.46(f). Thus, even if the Board construes Respondent's second exception as arguing that Respondent did not violate Section 8(a)(1) when Stacey Walker told Hyson about Respondent's unlawful rule, the Board should dismiss Respondent's exception.

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reasons. *Continental Group, Inc.*, 357 NLRB 409, 410 fn. 6 (2011). The Board differentiates between employer rules that are facially unlawful from rules that are unlawfully overbroad. Ibid. (explaining that unlawfully overbroad rules restrict both protected and unprotected activity.) An employer violates Section 8(a)(1) when it terminates an employee pursuant to a facially unlawful rule. *See FiveCAP, Inc.*, 331 NLRB 1165, 1169–70 (2000) (explaining that an employer violates the Act when it terminates an employee pursuant to a facially unlawful rule), enfd. 294 F.3d 768 (6th Cir. 2002); *see also Continental Group*, above, at 410 fn. 6 (explaining the difference between facially unlawful rules from unlawfully over broad rules and "expressly limit[ing]" the Board's *Continental Group* analysis to "cases involving discipline imposed to an unlawfully overbroad rule.") *But see Advancepierre Foods, Inc.*, 366 NLRB No. 133, slip op. at 2 fn. 4 (2018) (clarifying Administrative Law Judge's holding that a no-solicitation/no-distribution policy were facially unlawful but still relying on *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004) and *Continental Group, Inc.*, above, to conclude that terminations were unlawful because "discipline pursuant to an overbroad rule is unlawful under Section 8(a)(1)."). A rule that "expressly prohibits employees from discussing wages is not facially neutral and would be found unlawful under longstanding precedent . . . ." *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 3 fn. 4 (2019).

Under the *Continental Group* framework, the General Counsel must first establish by a preponderance of the evidence that an employer's rule is unlawfully overbroad and that the employer disciplined the employee pursuant to that rule. *See, e.g.*, *Butler Medical Transport, LLC*, 365 NLRB No. 112, slip op. at 4 (2017) (quoting *Continental Group, Inc.*, above at 412). The General Counsel must also demonstrate that the conduct for which the employee was terminated either: (1) constituted protected concerted activity; or (2) touched on the concerns

animating Section 7. Ibid. Once the General Counsel has established the above, an employer may avoid liability only if it demonstrates the employee's conduct "actually interfered with the employer's operations *and* that the interference, rather than the violation of the overbroad rule, was the reason for the discipline." Ibid. (emphasis added). Where the employer "provided the employee with the reason for the discipline, the employer must establish that it cited the interference, rather than the violation of the overbroad rule." Ibid.

The record in this case establishes that Respondent terminated Hyson pursuant to an unlawful rule. Respondent's rule explicitly prohibited employees from discussing their wages. (ALJD at 10:31–11:20, 17:6.). Notwithstanding the distinction between unlawfully overbroad rules and facially unlawful rules, the record therefore establishes that Respondent's rule prohibited Section 7 activity. Moreover, the record establishes both that Respondent terminated Hyson for conduct that violated that overly broad rule and that Hyson's conduct constituted protected concerted activity or touched on the concerns animating Section 7. Indeed, Respondent's initial position statement explicitly acknowledged that Hyson spoke with employees besides Stacey Walker "in regards to their pay," that Respondent terminated Hyson "for reasons that violated the company policy which he agreed to sign and adhere to," and that Hyson "had an understanding that discussing pay or anything that would make others feel uncomfortable was a violation of company policy." (GC Exh. 23 at 5.) In this regard, the General Counsel has established his burden under *Continental Group* framework by the preponderance of the evidence.

Moreover, Respondent has not proven its affirmative defense under *Continental Group*. Respondent simply presented no admissible evidence that Hyson actually interfered with Respondent's operations. Instead, Respondent presented only hearsay testimony regarding

Hyson's conversations with E'Amanda Walker and Fields but called neither to testify. However, Stacey Walker candidly acknowledged that she was not present for any such conversations. The record therefore contains *no* evidence regarding any actual interference with Respondent's operations. It is also unrebutted that Respondent did not provide Hyson with a termination letter. Although Stacey Walker claimed that Hyson "understood" at the end of the meeting that he was being terminated for "harassing" employees (Tr. 410:8–12), Walker cannot testify to Hyson's subjective state of mind. Nevertheless, Stacey Walker's testimony on this point provides *no* details supporting an inference that Hyson actually interfered with operations. Further, Stacey Walker's testimony provides no basis to infer that Respondent cited any interference with operations rather than the violation Respondent's overly broad rule. Indeed, Stacey Walker's letter included in Respondent's position statement is instructive. Stacey Walker's letter specifically explained that Hyson "had an understanding that discussing pay or anything that would make others feel uncomfortable was a violation of company policy." (GC Exh. 23 at 5.) Moreover, Stacey Walker's letter made *no* reference to any actual interference. In fact, the record evidence demonstrated that the Cricut blade and Hyson's complaints to E'Amanda Walker and Fields were the only topics that arose during Hyson's termination meeting, and he ALJ appropriately concluded that Respondent's claims regarding the Cricut machine were not credible. See discussion supra. Far from meeting its affirmative defense burden by the preponderance of credible evidence, Respondent therefore cannot show that it cited *any* type of interference as that basis for Hyson's discipline.[17]

[17] To the extent the Board construes Respondent's exceptions as suggesting that Hyson interfered with operations when he misplaced Respondent's Cricut blade, it is uncontroverted that Respondent's Cricut machine had been missing a blade since February—three months before the events at issue in this case. (See ALJD at 3:19 & fn. 4.) Further, as of the date of the hearing, Respondent had not replaced the relatively inexpensive blade that Hyson misplaced. (See

Accordingly, the record evidence therefore establishes a violation under *Continental Group*. Respondent maintained a facially unlawful rule in its K-12 Coders Handbook that prohibited employees from discussing their wages or terms and conditions of employment. As Respondent's position statement and the record testimony demonstrate, Respondent terminated Hyson pursuant to Respondent's unlawful rule because he discussed Respondent's travel and pay policies and Respondent mistakenly believed he discussed his wages with his co-workers at Boone Elementary. Respondent also presented no evidence that Hyson ever interfered with Respondent's operations in any way or that Respondent cited any interference with operations during Hyson's termination reading. The record therefore overwhelmingly establishes that Respondent's violated Section 8(a)(1) when it terminated Hyson pursuant to an unlawfully overboard rule.

In view of the above, the ALJ's *Continental Group* analysis appropriately concluded that Respondent had established any affirmative defense

B. Hyson Became Respondent's Employee Under Section 2(3) On January 30 (Respondent's Exception 2)

Respondent's second exception also claims that Respondent could not have violated Section 8(a)(1) on April 30 because Hyson did not become an employee until May 13. (Resp't Exceptions at 3–4.) Notwithstanding Respondent's overly simplistic—and legally invalid—view of Hyson's employee status, Board precedent and the record in this case conclusively establish that Hyson became Respondent's employee on February 25.

Section 2(3) of the Act broadly defines "employee" to include "*any* employee, and shall *not* be limited to the employees of a particular employer, unless the Act explicitly states

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Tr. 506:6–9, 520:15–25l; GC Exh. 49.) In this regard, Respondent cannot credibly argue that Hyson interfered with operations when he misplaced the Cricut blade.

otherwise . . . ." 29 U.S.C § 152(3) (emphasis added). As the Supreme Court has observed, the "breadth of [Section] 2(3)'s definition is striking: the Act squarely applies to 'any employee.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). The Court has further observed that the "phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition," which "includes any 'person who works for another in return for financial or other compensation.'" *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 90 (1995) (quoting American Heritage Dictionary 604 (3d ed. 1992)). An individual is an employee when the individual receives or anticipates economic compensation from an employer. *See Amnesty International of the USA, Inc.*, 368 NLRB No. 112, slip op. at 2 (2019). For example, applicants for employment—individuals who expect but have not yet received compensation—are statutory employees under Section 2(3) and are entitled to the protection of the Act. *Town & Country Electric, Inc.*, above at 87–88; *see also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 186–87 (1941); *see also Travel Queen Coaches, Inc.*, 192 NLRB 134, 134–135 & fn. 1 (1971) (affirming Trial Examiner's conclusion trainees in a job-training program were 2(3) employees under the Act where outside foundations provided employer with funding for 50 percent of trainees' salaries and only two of 100 to 125 individuals were retained beyond their training period).

Despite Respondent's repeated, misplaced, and ineffective attempts at hearing to characterize Hyson and other employees as "volunteers" during their unpaid training prior to assignment to a school, the record demonstrates that Hyson was a statutory employee from the time he submitted his application on January 30 to the day Respondent unlawfully terminated him on May 16. Indeed, Hyson and Respondent each anticipated that Hyson would receive financial compensation for work performed at K-12 Coders sites. After Hyson's January 30 application, Weary exchanged e-mail messages with him to arrange an interview where she

would be able to evaluate Hyson's skills. Although the interview was ostensibly to evaluate whether Hyson would be an appropriate participant in an apprenticeship program, it is uncontroverted that Weary told Hyson at the end of the interview that he was overqualified. It is likewise uncontroverted that Weary told Hyson that she had to first confirm that no other apprenticeship employers were interested in hiring Hyson. Weary then followed through on her promise and offered Hyson a job with Interns4Hire as a STEM Aide that proposed a work schedule, hourly wage, and start date. (GC Exh. 27 at 1; GC Exh. 28 at 1.) Hyson accepted Weary's offer in 11 minutes. (GC Exh. 27 at 1.) When Hyson did not immediately provide a signed copy of Weary's subsequent formal offer letter, Weary followed up with Hyson to confirm that he would accept the position. (GC Exh. 29). Hyson signed and returned the job offer on February 22. (GC Exh. 30.) Regardless of when Respondent began paying Hyson, this evidence alone establishes that Respondent and Hyson anticipated Hyson would receive financial compensation in exchange for work at K-12 Coders' job sites.

Respondent further cemented Respondent's employer-employee relationship with Hyson throughout February and March. Just two days after Hyson signed his job offer, Weary provided Hyson with a direct deposit form to be completed. (GC Exh. 31.) Hyson began his unpaid training on February 25. (Tr. 224:8–10; 240:20–24; GC Exh. 27 at 1; GC Exh. 28 at 1, GC Exh. 30.) During that training week, Weary explained that Hyson would be assigned to K-12 Coders' after-school programs in Washington, D.C. (Tr. 243:3–25.) Weary also provided Hyson with K-12 Coders' Handbook and required that he sign it. (Tr. 244:8–21.) On March 3, Weary instructed Hyson to continue his training in Eastern High School. (GC Exh. 32.) Weary's March 3 communication also instructed Hyson to wear his K-12 Coders shirt. (Ibid.) On March 5, Weary provided Hyson with payroll period dates. (GC Exh. 33.) The same day, Weary

informed Hyson that he would begin paid work on April 1. (GC Exh. 23 at 16.) On March 12, Weary requested a confirmation of Hyson's fingerprinting background check, which Hyson provided on March 13. (GC Exh. 34; GC Exh. 36 at 3.) On March 13, Weary asked Hyson to provide copies of health certificate forms. (GC Exh. 35.)

On March 29, Weary asked Hyson to meet in the office on Monday, April 1. (GC Exh. 36 at 3.) But, as Hyson explained in unrebutted testimony, a staffing agency offered Hyson a month-long assignment at Johns Hopkins. (Tr. 228:7–10, 247:17–24.) When Hyson received the offer, he asked Weary whether Respondent could hold his position for one month. (Tr. 228:7–10, 247:21–248:3.) Weary agreed. (Tr. 228:11–12, 248:4–8; GC Exh. 23 at 3.) On April 26, Hyson sent Weary a message explaining that he had completed his assignment with Johns Hopkins and that he was prepared to return. (GC Exh. 37 at 1; Tr. 228:13–16, 248:10–16.) In fewer than two-and-a-half hours, Weary welcomed Hyson back to Respondent, confirmed that Hyson should return to the Capitol Heights office, instructed Hyson to collect additional documentation, and explained that she would add him to Respondent's attendance software. (GC Exh. 37 at 1; Tr. 228:17–21, 248:17–19.) Between April 30 and May 11, Hyson focused on collecting the documents that Weary requested. (Tr. 248:18–25, 256:2–15.) When Hyson secured one of the documents, he provided the document to Stacey Walker, who scanned them in Respondent's system. (Tr. 256:13–15.) On May 11, after Hyson had submitted the necessary documents, Weary assigned Hyson to Boone as a Center Director beginning May 13. (Tr. 256:16–257:8.; GC Exh. 23 at 17.) Hyson reported to the Capitol Heights office and Boone between May 13 and May 15. On May 16, Respondent terminated Hyson before he left for Boone.

Throughout Hyson's relationship with Respondent, both parties therefore acted with the expectation that Hyson would receive compensation in exchange for services he rendered to Respondent. Notwithstanding the unpaid training Hyson had to complete before beginning work, such orientation and training are inapposite to whether Hyson expected to receive compensation. In this regard, Respondent's unpaid training requirement constituted an administrative hurdle—like the completion of necessary forms—or waiting period that in no way vitiate both parties' goal: Hyson working for Respondent in exchange for compensation. *Cf. Labor Ready, Inc.*, 327 NLRB 1055, 1055 & fn. 1, 1058 (1999) (affirming administrative law judge decision that no solicitation policy treating job applicants and individuals awaiting a job assignment or referral as nonemployees was facially invalid because it discouraged employees from engaging in Section 7 activity), enfd. 253 F.3d 195 (4th Cir. 2001). In this case, Hyson signed a job offer letter. Respondent repeatedly provided instructions to Hyson regarding his position and requested documentation to allow Hyson to work at Respondent's after-school programs in Washington, D.C.-area schools. Respondent also provided Hyson with a handbook that employees were required to follow and required that Hyson sign it. Hyson complied. After Respondent provided a start date of April 1, Respondent agreed to hold Hyson's job while he worked with Johns Hopkins. When Hyson explained that his work with Johns Hopkins was complete, Respondent immediately welcomed Hyson back with open arms. Respondent requested additional documents from Hyson, Hyson provided them, and Respondent again assigned him a start date. In view of the above, the Administrative Law Judge should conclude that Hyson was a statutory employee under the Act between Hyson's January 30 application and his May 16 termination.

To the extent Respondent contends that Hyson ceased to be an employee when he left training to work at Johns Hopkins, see, e.g., *Model A and Model T Motor Car Corp.*, 259 NLRB 555, 555, 568–69 (1981) (approving administrative law judge decision concluding that an employer's letter to a former secretary threatening a lawsuit could not violate the Act because the secretary has already resigned and thus was not an employee at the time the employer sent the letter), Respondent's argument again ignores the facts of this case. Here, Respondent offered Hyson a position as a STEM Aide working at K-12 Coders locations in Washington, D.C. It is undisputed that in about March, Hyson asked Weary if she would hold his job for him while he worked with Johns Hopkins. It is likewise undisputed that Weary agreed to hold his position for one month. Thus, the record demonstrates that Hyson never resigned employment with Respondent and the Board should conclude that Hyson continued to be an employee under Section 2(3) regardless of his brief absence from Respondent.

Yet even if the Board were to conclude that Hyson ceased to be Respondent's employee during his brief absence, the record conclusively demonstrates that Hyson regained his status as a 2(3) employee on April 26. On April 26, Hyson sent Weary an e-mail explaining that he was ready to return to Respondent the following week. In view of Hyson's past communications with Weary, Hyson therefore renewed his status a job applicant. But the record also shows that Weary promptly responded that Hyson could return to Respondent. Notwithstanding Weary's caveat that Hyson could not be officially placed on the schedule until he submitted additional documentation to permit Hyson to work in a school, Weary's message shows that documentation was a mere formality before Weary assigned him to one of Respondent's after-school programs. In fact, Weary's April 26 e-mail even pledges to add Hyson to the Respondent's employee software and explains its functions to Hyson. In this regard, Weary's communications are not

the instructions of an employer still deciding whether to hire an employee. Rather, they reflect guidance an employer provides when it has decided to add someone to the staff it is building to meet the needs of their changing and expanding business. (*See* GC Exh. 37 at 1 (explaining that Respondent's business had changed and expanded to three locations).) Thus, Respondent cannot credibly contend that Hyson had not regained his status as Section 2(3) employee on April 26.

C. The ALJ's Recommended Order Appropriately Includes Standard Board Remedies for Hyson's Unlawful Discharge

Notwithstanding Respondent's misplaced third exception, the record and Board precedent demonstrate that the ALJ's recommended order is appropriate. Specifically, Respondent erroneously took exception to the ALJ's order that Respondent make Hyson whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the ALJD's remedy section, compensate Hyson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, file a report with the Social Security Administration allocating the backpay award to the appropriate calendar years, and submit a copy of the W-2 reflecting backpay paid to Hyson to the Regional Director.[18] (Resp't

[18] The ALJD also ordered Respondent to: (1) cease and desist from maintaining a rule prohibiting employees from discussing their wages or working conditions; (2) cease and desist from telling employees that Respondent's rules prohibit employees from discussing their wages or working conditions; (3) cease and desist from discharging or otherwise discriminating against any employee for engaging in protected activities; (4) cease and desist from discharging or otherwise discriminating against any employee pursuant to unlawful rules; (5) cease and desist from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act; (6) offer Hyson, within 14 days from the date of the Board's Order, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed; (7) remove from its files, within 14 days from the date of the Board's Order, any references to Hyson's unlawful discharge and within 3 days thereafter notify Hyson that the files have been removed and that the discharge will not be used against him in any way; (8) rescind the rule prohibiting employees from discussing their wages or working conditions, if Respondent had not already done so; (9) advise employees that Respondent's

Exceptions at 4.) However, the Board has held that make-whole remedies for the loss of earnings and other benefits, compensation for adverse tax consequences for receiving a lump-sum backpay award, and the filing of a report with the Social Security Administration are standard remedies for an unlawful discharge. *See, e.g.*, *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 2 fn. 5, 11–12 (2019). Moreover, the ALJ granted the General Counsel's unopposed motion requesting leave to amend the Amended Complaint to specifically plead, as part of the remedy requested, that Respondent be required to submit W-2 forms reflecting backpay to the Regional Director. (ALJD at 20 fn. 31.) This technical amendment requiring Respondent to provide a single additional document—which will already exist—to the Regional Director will allow the Region to ensure that the Board's remedies are effectively applied and enforced. Accordingly, the ALJ appropriately included each of the remedies in his recommended order.

Dated at Washington, D.C., this 10th day of August 2020.

Respectfully submitted,

/s/ **Paul J. Veneziano**

Paul J. Veneziano
Counsel for the General Counsel
Washington Resident Office
1015 Half Street SE, Suite 6020
Washington, D.C. 20570
paul.veneziano@nlrb.gov

unlawful rule had been rescinded; (10) sign and post a notice, within 14 days after service by the Region, at its facilities at 201 Ritchie Road, B-2, Capitol Heights, MD, and 833 Kennedy Street, NW, Washington, D.C., and, if Respondent has gone out of business or closed either facility during the pendency of these proceedings, duplicate and mail a copy the notice to all current employees and former employees Respondent employed at any time since April 30, 2019; and (11) file with the Regional Director, within 21 days after service by the Region, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply. (ALJD at 19:17–21:4.) Because Respondent has not excepted to these portions the ALJ's recommended order, Respondent has waived them for all purposes under the Board's Rules and Regulations. See Section 102.46(f).

CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Answering Brief to Respondent's Exceptions was filed electronically on August 10, 2020, and, on the same day, copies were electronically served on the following individuals by e-mail:

Ms. Tarsha Weary
Director of Operations/Executive Director/CEO
SW Design School LLC, d/b/a Interns4Hire.com
and d/b/a K-12 Coders, and SW Design School, L3C
tarsha@thecareerleaders.com

Mr. Matthew Hyson
11402 Old Fredrick Road
Marriottsville, MD 21104
mhyson@gmail.com

Dated at Washington, D.C., this 10th day of August 2020.

Respectfully submitted,

/s/ **Paul J. Veneziano**

Paul J. Veneziano
Counsel for the General Counsel
Washington Resident Office
1015 Half Street SE, Suite 6020
Washington, D.C. 20570
paul.veneziano@nlrb.gov